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October 16, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments of RSL COM U.S.A., Inc.
IB Docket No. 981-148 ✓
CC Docket No. 90-337

98-148

Dear Ms. Salas:

Transmitted herewith, on behalf of RSL COM U.S.A., Inc., are an original and six (6) copies of its Reply Comments in the above-referenced matter. Diskette copies of these Reply Comments are being simultaneously submitted to Donna Christianson in the International Bureau and to International Transcription Services, Inc.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

If you have any questions please contact the undersigned.

Very truly yours,

HOLLAND & KNIGHT LLP



Eric Fishman
Counsel for
RSL COM U.S.A., Inc.

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BEFORE THE
Federal Communications Commission
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In the Matter of)
)
1998 Biennial Regulatory Review—)
Reform of the International Settlements)
Policy and Associated Filing Requirements)
)
Regulation of International)
Accounting Rates)

IB Docket No. 98-148

CC Docket No. 90-337

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF RSL COM U.S.A., INC.

RSL COM U.S.A., Inc. ("RSL USA"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby replies to Comments submitted in response to the Notice of Proposed Rulemaking ("NPRM") released by the Commission in the above-captioned proceeding.

I. The Commission Should Eliminate ISP Requirements Where Certain Foreign Carriers Lack Market Power.

In the NPRM, the Commission tentatively concluded that it should discontinue the application of the International Settlements Policy ("ISP")¹ in certain situations. Specifically, the ISP would no longer apply to U.S. carrier arrangements with foreign carriers that lack market power, provided the foreign carrier's home country is a member of the World Trade Organization ("WTO"). In its initial comments, RSL USA generally supported this tentative conclusion. Most

¹The ISP currently requires: 1) the equal division of accounting rates between the U.S. carrier and the foreign carrier; 2) nondiscriminatory treatment of U.S. carriers; and 3) a proportionate return of inbound traffic. NPRM ¶ 6.

other commenters largely agreed that the ISP requirements should not be applied to arrangements with foreign carriers lacking market power.

As the Commission noted, the proposal is consistent with the *Foreign Participation Order*,² in which the Commission adopted a presumption, for the purposes of applying the "No Special Concessions" rule, that a carrier with less than 50% market share in the relevant market lacks sufficient market power to affect competition adversely in the United States. The Commission's presumption has borne out well, as settlement rates continue to drop, with little if any evidence of anticompetitive practices. Extending the presumption to the ISP regime would spur further reductions in settlement rates, to the benefit of consumers in the United States. And removing the ISP would not increase the danger of whipsawing or other anticompetitive effects because the affected carriers lack market power and cannot coerce other U.S. carriers to accept higher settlement rates. In short, where U.S. carriers have legitimate choices of correspondents, the potential for whipsawing all but disappears. Thus, RSL USA reiterates its support for the Commission's tentative conclusion to discontinue the ISP where foreign carriers in WTO countries possess less than 50% market share.

As a corollary to its tentative conclusion, the Commission also sought comments on three alternative proposals for modifying its filing requirements. First, the Commission proposed eliminating all filing requirements for arrangements with foreign carriers with less than 50% market share. No filing would be required to substantiate this claim. Under the second proposal, carriers would be required to file a certification that the correspondent lacks market power and

²*Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891, ¶ 161 (1997) ("*Foreign Participation Order*").

identify the route. The Commission's third alternative would require public (or perhaps confidential) disclosure of the foreign carrier, as well as public (or perhaps confidential) disclosure of data showing that the foreign carrier exercises less than 50% market share.³

RSL USA supports the Commission's first proposal, that arrangements with foreign carriers with less than 50% market share should not have to be filed with the Commission at all, and no filing should be required to substantiate the claim that the foreign carrier lacks market power. RSL USA's endorsement of the Commission's first proposal is supported by the comments of MCI WorldCom,⁴ Qwest,⁵ GTE,⁶ CompTel,⁷ and TRA.⁸ TRA notes that one of the principal reasons for relaxing the ISP is to limit the disclosure of settlement rates, thereby encouraging lower settlement rates. Any public filing requirements would be contrary to the Commission's stated goal of lowering these rates and may lead to "market leader" pricing.

Moreover, public filing requirements would be cumbersome and unnecessary in the context of arrangements where the foreign carrier lacks market power. Even confidential filing

³NPRM ¶ 23.

⁴MCI WorldCom Comments at 2.

⁵Qwest Comments at 5-6.

⁶GTE Comments at 4.

⁷CompTel Comments at 8-9.

⁸TRA Comments at 4. However, RSL USA does not share TRA's proposal to reduce to 25% the level of market share at which a lack of market power would be presumed. Fifty percent is a convenient figure that facilitates the identification of dominant carriers, whereas reducing the figure to 25% would burden carriers and the Commission with complicated assessments of market structure, which in turn may necessitate filing requirements. Furthermore, as the Commission has noted, "[c]ourts virtually never find monopoly power when market share is less than about 50%." *Foreign Participation Order*, 12 FCC Rcd ¶ 161.

requirements would be unnecessary, since, as MCI WorldCom states, it is rarely ambiguous whether a foreign carrier exercises market power.⁹ The Commission would be merely collecting evidence of what the marketplace already knows. Thus, RSL USA urges the Commission to reject its third proposal. The second proposal should be rejected because it amounts to needless paperwork for U.S. carriers who do not exercise market power, and simply provides the Commission with useless, generic information.

Eliminating the filing requirements according to the first proposal would further the public interest by facilitating market entry, reducing transaction costs for carriers, and reducing administrative burdens on service providers and the Commission itself. The Commission should seek to reduce regulatory oversight in areas in which the marketplace is competitive. Here, under the first proposed alternative, where choices for correspondents abound, filing requirements are irrelevant because competition already exists. Where no choice of correspondent is available, or where duopolies remain, the Commission's ISP requirements will still apply, including all associated filing requirements. Accordingly, the Commission should adopt its first proposal to eliminate filing obligations on competitive routes.

While RSL USA generally supports the liberalization of the ISP, it remains cognizant of the potential dangers to competition if the regime is liberalized too quickly. Deutsche Telekom's proposal, for instance, simply goes too far, too soon by proposing to extend procompetitive rules to those who are positioned to abuse them. The Commission has wisely set forth a balanced approach that encourages innovative arrangements without significantly increasing the potential for carriers with market power to engage in anticompetitive practices. For similar reasons, RSL

⁹MCI WorldCom Comments at 4.

USA urges the Commission to reject appeals by some commenters to extend the relaxation of the ISP to non-WTO countries.

II. ISP Requirements Should Be Eliminated Where a Majority of Traffic Is at or Below Benchmark Levels, Where Equivalent Resale Opportunities Exist, and Where the Arrangement Is Between Carriers on ISR-Authorized Routes.

In the NPRM, the Commission also proposed eliminating the ISP and related filing requirements for arrangements with foreign carriers in certain WTO countries, regardless of whether the foreign carrier possesses market power.¹⁰ Specifically, the Commission proposed three alternative situations in which it would decline to apply the ISP: 1) where the Commission has authorized international simple resale ("ISR") on the route; 2) where at least 50% of the traffic is settled at or below the *Benchmarks Order's* "best practices" rate of \$.08 per minute; or 3) where 50% or more of the traffic is settled at or below benchmark rates for that foreign country *and* the foreign market permits U.S. carriers to provide service via ISR.

RSL USA largely agrees with the comments submitted by Qwest in response to these alternatives. Qwest endorses the Commission's first proposal, noting that the ISP is essentially superfluous on routes where ISR has been approved because ISR permits a U.S. carrier to bypass the ISP by carrying its switched traffic over private lines. Furthermore, Qwest asserts, and RSL USA agrees, that the dangers of whipsawing are implicitly eliminated where ISR is authorized on the route.¹¹

In addition, RSL USA submits that either branch of the Commission's third proposal would be sufficient to justify discontinuance of the ISP. First, where a WTO country affords

¹⁰NPRM ¶¶ 25, 30.

¹¹Qwest Comments at 4.

U.S. carriers equivalent resale opportunities, competition either already exists or will soon develop, thus negating the need for the ISP. Second, where 50% of the traffic on the route is settled at or below benchmark levels for that country, the low settlement rate is itself evidence that the foreign carrier is not attempting to whipsaw U.S. carriers. RSL USA therefore encourages the Commission to negate the ISP where either of these conditions exists.

The Commission's second proposal should be rejected because it is an unduly difficult threshold. The *Benchmarks Order* recognized that some countries have, for various reasons, liberalized more quickly than others. Accordingly, the Commission established a progressive rate structure. It would be imprudent at this point to measure each country's liberalization efforts by a uniform rate which may be unachievable in the short term for some countries.

With regard to filing requirements in this context, RSL USA supports the elimination of all filing requirements where the ISP has been removed, except for arrangements entered into with foreign carriers with market power. Such a rule would be consistent with the filing requirements proposed by the Commission in other parts of the NPRM, and would act as a check on the potential for anticompetitive practices.

III. The Flexibility Policy Should Be Retained, in a Slightly Modified Form.

As the Commission and many commenters noted, if the Commission modifies the ISP, much of the flexibility policy will be rendered irrelevant. RSL USA agrees. In those situations where the flexibility policy may still apply, however, the Commission sought comments on proposals to expand the flexibility policy. The Commission proposed to allow authorized U.S. carriers to enter into flexible settlement arrangements without revealing either the name of the foreign correspondent or the terms and conditions of the arrangement, provided the arrangement

affects less than 25% of the inbound and outbound traffic on a given route. As a safeguard to competition, arrangements affecting more than that amount of traffic would still be required to be publicly filed and could not contain unreasonably discriminatory terms or conditions. A further safeguard would remain under the Commission's proposal: Arrangements between affiliated carriers, or between carriers involved in a non-equity joint venture, would still need to be publicly filed.

To the extent that the flexibility policy remains applicable, RSL USA supports the Commission's proposals. RSL USA also concurs with MCI WorldCom that the Commission should retain its current prior approval process and safeguards for arrangements with dominant foreign carriers on routes where the ISP has not been removed. RSL agrees with MCI WorldCom's proposal to modify the filing requirements by permitting confidential filings in certain circumstances.¹² In this way, the Commission can oversee such arrangements while the marketplace benefits from fewer arrangement disclosures.

¹²MCI WorldCom Comments at 7-8.

IV. The "No Special Concessions" Rule Should Be Retained, but Should Not Apply on ISR-Authorized Routes.

Finally, RSL USA joins MCI WorldCom,¹³ TRA,¹⁴ AT&T,¹⁵ Sprint,¹⁶ and the GSA¹⁷ in their general support of the Commission's tentative conclusion to retain certain restrictions on exclusive arrangements with dominant foreign carriers. The "No Special Concessions" rule acts as a significant deterrent to anticompetitive conduct by dominant foreign carriers who control essential facilities, and furthermore is consistent with the WTO Basic Telecom Agreement's nondiscriminatory interconnection requirements.

However, RSL USA generally supports the Commission's tentative conclusion that special concessions may be included in the terms and conditions under which traffic is settled by a U.S. carrier on an ISR route.¹⁸ The ISR policy serves an important role in liberalizing the international telecommunications marketplace. Applying the "No Special Concessions" rule to ISR would undermine the influence of ISR in the liberalization process, and would run counter to the efforts of every other proposal in the NPRM. Therefore, RSL USA urges the Commission

¹³MCI WorldCom Comments at 10.

¹⁴TRA Comments at 8.

¹⁵AT&T Comments at 15.

¹⁶Sprint Comments at 12.

¹⁷GSA Comments at 10.

¹⁸Regardless of an ISR arrangement, the "No Special Concessions" rule should still apply to exclusive arrangements with dominant foreign carriers, insofar as the interconnection of international facilities, private line provisioning and maintenance, and quality of service are concerned.

to explicitly state that the "No Special Concessions" rule does not apply to the settlement of traffic under an ISR arrangement, but remains applicable to all other arrangements.

Respectfully submitted,

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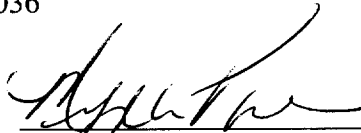
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